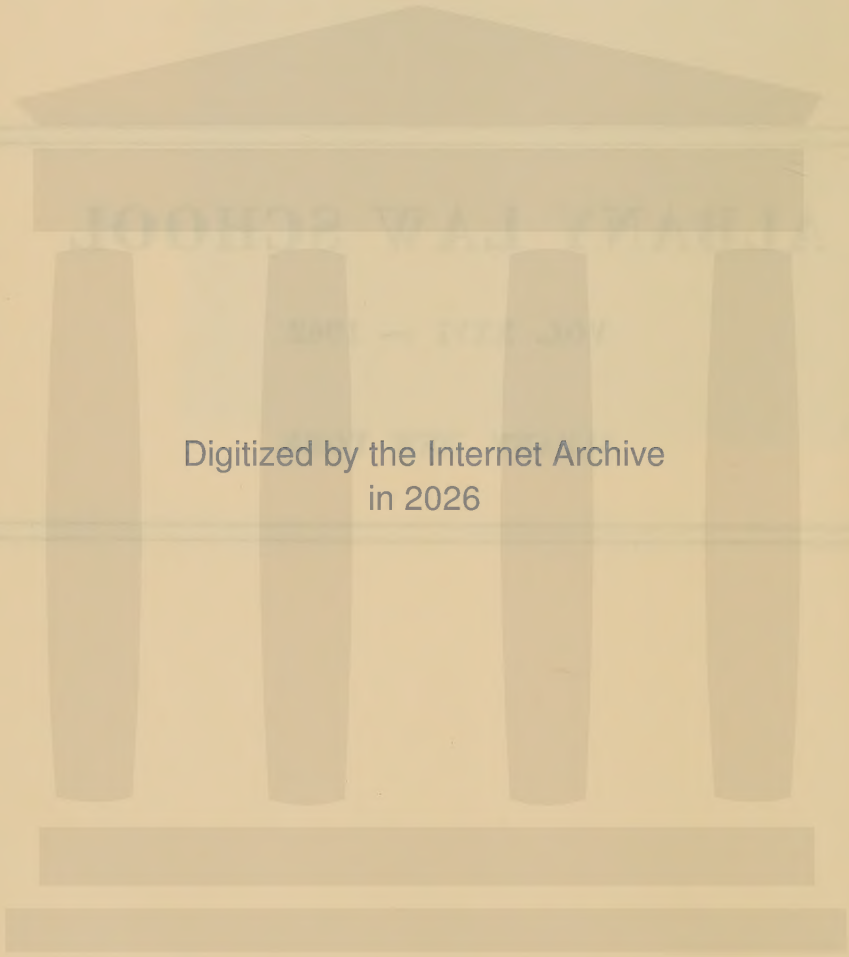
ALBANY LAW SCHOOL

VOL. XXVI — 1962

ALBANY, NEW YORK



Digitized by the Internet Archive
in 2026

https://archive.org/details/albany-law-review_1962_26_contents

Professor Edward S. Godfrey, faculty advisor to the Albany Law Review Board, has been appointed Dean of the School of Law of the University of Maine. The Albany Law Review Board wishes to express to him its sincere appreciation for the dedicated assistance and guidance which he has provided during his three years as faculty advisor.

ALBANY LAW REVIEW

Published by

THE LAW REVIEW BOARD OF THE ALBANY LAW SCHOOL

VOL. XXVI 1962

STEPHEN M. KIERNAN
Editor-in-Chief

CHARLES E. CRANDALL, JR.
GERALD S. MURANTE
Comments Editors

STEPHEN S. DELISIO
Articles Editor

EDWIN J. TOBIN
Legislation Editor

D. BRUCE CREW III
Recent Decisions Editor

DALE T. TUCKER
Managing Editor

ARTHUR F. MATHEWS
Digests Editor

JOHN R. KELLIGREW
WILLIAM A. STONE
Research Editors

Associate Editors

RONALD A. BLAKE
JOSEPH C. DAVIDSON, JR.
J. FRANCIS DOYLE, JR.
J. RICHARD FITZGERALD
SHOLOM B. KOPLOVITZ
EDWARD J. MARTIN III
ANDREW A. MATTHEWS, JR.
MARGRETHE R. POWERS
HOWARD W. ROTH
ANDREW L. SIPOS, JR.
WILLIAM D. SMITH

MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS

Printed in U.S.A.
Copyright 1962 by Albany Law Review

UNIVERSITY OF ARIZONA
LIBRARY

TABLE OF CONTENTS TO VOLUME XXVI

LEADING ARTICLES

CONCLUSIVENESS OF THE ASSESSMENT IN A FEDERAL LIEN FORECLOSURE SUIT ..... *Edward A. Bogdan, Jr.* 13

ENFORCEMENT OF DELINQUENT PROPERTY TAXES IN NEW YORK (PART IV, FIRST HALF) ..... *Edward S. Godfrey* 201

LOSS OF NATIONALITY: INDIVIDUAL CHOICE OR GOVERNMENT FIAT? ..... *David W. Maxey* 151

NOTE ON THE HISTORY IN NEW YORK STATE OF THE POWERS OF GRAND JURIES ..... *John Van Voorhis* 1

THE STATE AND LEWIS WOLFE: A CASE HISTORY ..... *Andrew V. Clements* 187

COMMENTS

A REVIEW OF THE PRESUMPTION OF DEATH IN NEW YORK 231

CONSENT TO SURGICAL OPERATIONS 25

CORPORATE INCOME TAXATION TREATMENT FOR PROFESSIONAL GROUPS 246

ESTOPPEL AND THE NEW YORK STATUTE OF LIMITATIONS 38

INCOME TAXATION OF NONQUALIFIED DEFERRED COMPENSATION ARRANGEMENTS 47

JURISDICTION OVER THE FOREIGN CORPORATION 61

MUNICIPAL LIABILITY FOR NEGLIGENCE IN NEW YORK: SEPARATION OF POWERS AS A DEFENSE 75

PROSPECTIVE USE OF THE GRANT-BACK CLAUSE IN DOMESTIC AND FOREIGN PATENT LICENSING AGREEMENTS 256

RIGHT TO COUNSEL IN ADMINISTRATIVE HEARINGS 276

THE ADMONITORY FUNCTION OF PUNITIVE DAMAGES AND ITS IMPACT ON THE LAW OF FRAUD AND DECEIT 288

THE PROPOSED AMENDMENT TO THE M'NAGHTEN RULE 305

RECENT DECISIONS

CIVIL PROCEDURE—LIS PENDENS—MAY NOT BE FILED IN AN ACTION TO ENJOIN NUISANCE—*Braunston v. Anchorage Woods, Inc.*, 10 N.Y.2d 302, 178 N.E.2d 717, 222 N.Y.S.2d 316 (1961) 315

CONSTITUTIONAL LAW—COMPULSORY MEMBERSHIP IN INTEGRATED STATE BAR CONSTITUTIONAL—*Lathrop v. Donohue*, 367 U.S. 820 (1961) 86

CONSTITUTIONAL LAW—DUE PROCESS—DISBARMENT BASED ON GOOD FAITH REFUSAL TO TESTIFY AT A JUDICIAL INQUIRY IS NOT ARBITRARY OR DISCRIMINATORY—*Cohen v. Hurley*, 366 U.S. 117 (1961) 89

CONSTITUTIONAL LAW—DUE PROCESS—NOTICE PROVISIONS OF WATER SUPPLY ACT CONSTITUTIONAL—*Schroeder v. City of New York*, 10 N.Y.2d 522, 180 N.E.2d 568, 225 N.Y.S.2d 210 (1962) 321

CONSTITUTIONAL LAW—EVIDENCE OBTAINED BY UNREASONABLE SEARCHES AND SEIZURES INADMISSIBLE IN STATE PROSECUTIONS—*Mapp v. Ohio*, 367 U.S. 643 (1961) 92

CONSTITUTIONAL LAW—SUBVERSIVE ACTIVITIES CONTROL ACT—SUFFICIENCY OF EVIDENCE—MANDATORY REGISTRATION OF THE COMMUNIST PARTY CONSTITUTIONAL —*Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) 95

CRIMINAL LAW—IMPROPRIETIES IN SUMMATION GROUNDS FOR REVERSAL—CONFESSIONS ADMISSIBLE THOUGH OBTAINED DURING ILLEGAL INCARCERATION—*People v. Lane*, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961) 325

CRIMINAL LAW—OBSCENITY—INFORMATION CHARGING DEFENDANT WITH SELLING AND DISTRIBUTING OBSCENE MAGAZINE DISMISSED—*People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961) 102

TABLE OF CONTENTS TO VOLUME XXVI

CRIMINAL LAW—SENTENCE—UNREASONABLE DELAYS—FAILURE TO SENTENCE CAUSES COURT TO LOSE JURISDICTION—*People ex rel. Harty v. Fay*, 10 N.Y.2d 374, 179 N.E.2d 483, 223 N.Y.S.2d 468 (1961) 330

DOMESTIC RELATIONS—ILLEGIMITATE CHILD—VISITATION RIGHTS GRANTED TO PUTATIVE FATHER—*People ex rel. "Francois" v. "Ivanova,"* 14 App.Div. 2d 317, — N.Y.S.2d — (1st Dep't 1961) 335

EVIDENCE—CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE—ACTS COMMITTED IN PRESENCE OF THIRD PARTIES PRESUMPTIVELY NOT PRIVILEGED—*People v. Melski*, 10 N.Y.2d 78, 176 N.E.2d 81, 217 N.Y.S.2d 65 (1961) 340

LIBEL—DEFAMATION OF PROPERTY LIBELOUS PER SE—*Harwood Pharmacal Co. v. National Broadcasting Co.*, 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961) 105

NEGLIGENCE—EMOTIONAL DISTURBANCE—RECOVERY ALLOWED WITHOUT ALLEGATION OF IMPACT—*Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) 108

NEGOTIABLE INSTRUMENTS—HOLDER IN DUE COURSE—FORGOTTEN NOTICE—*First Nat'l Bank v. Fazzari*, 10 N.Y.2d 394, 179 N.E.2d 493, 223 N.Y.S.2d 483 (1961) 344

SALES—EXPRESS WARRANTY—ABROGATION OF THE PRIVITY RULE—*Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) 349

SALES—WARRANTY AND NEGLIGENCE LIABILITY OF CIGARETTE MANUFACTURER FOR USER'S LUNG CANCER—*Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961) 354

SUBCONTRACT LET BY GOVERNMENT CONTRACTOR—CHOICE OF LAW GOVERNING—INTERPRETATION OF "EQUITABLE ADJUSTMENT" CLAUSE—*American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th cir. 1961) 111

UNEMPLOYMENT INSURANCE—SUSPENSION OF BENEFITS DUE TO INDUSTRIAL DISPUTE —"ESTABLISHMENT" ACCORDED A GEOGRAPHICAL MEANING—*Matter of Ferrara*, 10 N.Y.2d 1, 176 N.E.2d 43, 217 N.Y.S.2d 11 (1961) 116

WORKMEN'S COMPENSATION LAW—DAMAGES—EMPLOYER'S ACTION FOR BREACH OF WARRANTY—DAMAGES MEASURED BY AMOUNT OF COMPENSATION PAYMENTS—*General Aniline & Film Corp. v. A. Schrader & Son, Inc.*, 13 App. Div. 2d 359, 215 N.Y.S.2d 861 (3d Dep't 1961) 120

LEGISLATION 124, 361

BOOK REVIEWS

DAUGHTERS IN LAW. By Henry Cecil. New York: Harper & Bros. 1961. Pp. 186.... 376

PRODUCTS LIABILITY. Volume 2. By Louis Frumer and Melvin I. Friedman. Albany: Matthew Bender & Company. 1961. Pp. 2075..... 131

THE COMMON LAW TRADITION: DECIDING APPEALS. By Karl N. Llewellyn. Boston: Little Brown & Co. Pp. xx, 450..... 133

THE CONSTITUTION OF LIBERTY. By Friedrich A. Hayek. Chicago: University of Chicago Press. 1960. Pp. x, 569 367

WILLISTON ON CONTRACTS. Third Edition. By Walter H. E. Jaeger. Mt. Kisco: Baker Voorhis & Co., Inc. Vol. 1, 1957. Pp. xxii, 826. Vol. 2, 1959. Pp. xv, 1095. Vol. 3, 1960. Pp. xii, 937. Vol. 4, 1961. Pp. ix, 1167..... 137

DIGESTS OF CURRENT DECISIONS 141, 380

TABLE OF CASES

A

PAGE

Allbright-Nell Co. v. Stanley Hiller Co. 258
American Banana Co. v. United Fruit Co. 264
American Pipe & Steel Corp. v. Firestone Tire & Rubber Co..... 111
Anustaplo, *In re*..... 90
Arballo v. Nielson..... 31
Astor v. The Mayor..... 216

B

Bagdon v. Philadelphia & Reading Coal & Iron Co..... 65
Bailey v. City of New York..... 76
Baker v. Baker..... 337
Bakker v. Welsh.....28, 29
Bates & Guild Co. v. Payne..... 22
Battalla v. State..... 108
Becker v. United States..... 19
Bennan v. Personnet..... 27
Bernardine v. City of New York..... 78
Binks Mfg. Co. v. Ransburg Electro-Coating Corp..... 263
Bowers v. American Sur. Co..... 19
Boyd v. United States.....93, 95, 101
Braunston v. Anchorage Woods, Inc... 315
Brevoort, Matter of..... 238
Brookman v. Metcalf..... 40
Bull v. United States..... 13
Burrow S.S. Co. v. Kane.....63, 64
Bushel v. Commonwealth Ins. Co..... 61

C

C. E. Gullett.....50, 55
Central Union Trust Co. v. Garvon... 18
Chambers v. Nottebaum..... 32
Clinkenbeard v. United States..16, 20, 22
Cohen v. Hurley.....89, 90
Commissioner v. Oates.....54, 55
Communist Party of the United States v. Subversive Activities Control Bd. 95, 96
Compania De Astral, S. A. v. Boston Metals Co.....70, 71, 72
Connor v. New York Life Ins. Co.... 237
Consolidated Edison Co. v. NLRB.... 98
Cooper v. United States..... 278
Corn v. French..... 35
Cunnius v. Reading School Dist..... 240
Cutter Labs., Inc. v. Lyophile-Cryochem Corp. 260

D

Day v. Essex County Bank.....61, 63
Day v. Newark India-Rubber Mfg. Co. 63

PAGE

Dobson v. Commissioner..... 23
Doe v. Jesson..... 232
Dollar Savings Bank v. United States.. 16
Drug Research Corp. v. Curtis Publishing Co. 107, 108
Durham v. United States..... 309

E

Eagle v. Emmet..... 237
Eno v. The Mayor..... 212
Ensign v. Barse.....226, 227
Erbe v. Lincoln Rochester Trust Co. 43, 45, 46
Erie R.R. v. Tompkins..... 113
Erlanger Mills v. Cohoes Fibre Mills.. 72
E. T. Sproull.....53, 56

F

Ferrara, Matter of..... 116
Ferrer's Case 305
First Nat'l Bank v. Fazzari.....344, 345
Frederick J. Wolfe..... 53
Fusco v. Moses..... 282

G

Galt v. United States.....250, 254
Gaylord v. Van Loan..... 40
General Aniline & Film Corp. v. Schrader & Son, Inc..... 120
George W. Drysdale.....53, 54, 55, 60
Gill v. Cubitt..... 345
Goldey v. Morning News.....63, 64
Graham v. United States..... 21
Grand Jury (TV Quiz Program), Matter of 10
Greenberg v. Lorenz..... 353
Green v. Shoemaker & Co..... 110
Griffiths v. Commissioner.....48, 57
Groban, *In re*..... 286
Guaranty Trust Co., *In re*..... 237

H

Hadfield's Case..... 305
Hale v. Henkel..... 7
Hancock v. Hullett..... 30
Hanson v. Denckla.....66, 67
Hartford-Empire Co. v. United States 258
Harwood Pharmacal Co. v. National Broadcasting Co..... 105
Hobbs v. Kizer..... 30
Hooker v. Hoey..... 53
Flora v. United States..... 19
Howard Veit..... 51

I

PAGE

Inglis v. Trustees of Sailor's Snug Harbour 161
International Ass'n of Machinists v. Street 88
International Nickel Co. v. Ford Motor Co. 262
International Shoe Co. v. Washington 65, 66, 67, 69, 71, 72

J

Jalbuena v. Dulles..... 175
J. D. Amend..... 49
Johns v. Bay State Abrasive Products Co. 69, 72

K

Keister v. O'Neil 32
Kilpatrick v. Texas & P. Ry. Co..... 69
Konigsberg v. State Bar..... 90
Kujek v. Goldman..... 301

L

Lafayette Ins. Co. v. French.....62, 63
Lane v. Wilcox 300
Lansing v. Toolan.....79, 80
Larocque v. Conheim.....29, 30
Lathrop v. Donohue.....86, 88
Lennon v. Mayor.....206, 207, 216
Libbey v. Hodgdon..... 61

M

Machcinski, Matter of.....118, 119
Mackenzie v. Hare.....171, 173
Maercklein v. Smith..... 31
Mapp v. Ohio.....92, 94, 326, 327
Maryland Cas. Co. v. United States... 20
McCulloch v. Maryland..... 177
McGee v. International Life Ins. Co. 66, 67
McGuire v. Rix..... 26
Middlebrooks v. Springfield Fire Ins. Co. 61
Milliken v. Heddesheimer..... 30
Mitchell v. Rochester Ry..... 109
M'Naghten's Case 305
Modern Art Printing Co. v. Skeels.... 262
Moeller v. Wolkenberg..... 320
Mohr v. Williams..... 26
Morey v. Town of Newfane..... 77
Morrissey v. Commissioner..248, 251, 254
M'Queen v. Middletown Mfg. Co..... 61
Mullane v. Central Hanover Trust Co. 323, 325

N

NAACP v. Alabama *ex rel.* Patterson 100
Nelson v. Miller..... 69
Nishikawa v. Dulles..... 151
Noonan v. City of Albany..... 318

O

PAGE

Oehlhof v. Solomon..... 300
Oreste Casale 59, 60

P

Peckham v. North Parish in Haverhill 61
People *ex rel.* "Francois" v. "Ivanova" 335
People *ex rel.* Harty v. Fay.....330, 331
People *ex rel.* Kilmer v. McDonald 215, 224
People *ex rel.* Long v. Whitney..... 282
People v. Daghita..... 342
People v. Horton..... 308
People v. Lane.....325, 326
People v. Melski..... 340
People v. Richmond County News, Inc. 102, 103
People v. Wolfe..... 187
Perez v. Brownell.....151, 176, 177
Perkins v. Elg..... 172
Peterson v. United States..... 279
P., *In re*..... 280
Pipola v. Chicco.....13, 14, 21, 24
Pomeroy v. N.Y. & N.H. R.R. Co..... 63
Powell v. Alabama 285
Pritchard v. Liggett & Myers Tobacco Co. 354, 355
Putnam v. Triangle Publications..... 72

R

Railroad Co. v. Harris.....63, 64
Railway Employees' Dep't v. Hanson 87, 88, 89
Randy Knitwear, Inc. v. American Cyanamid Co.....349, 350
Reno v. Bull..... 299
Renton K. Brodie..... 53
Rex v. Arnold 305
Rex v. Macdonald..... 154
Richard R. Deypree..... 52
Riverside & Dan River Cotton Mills v. Menefee 64, 65, 67
Rolater v. Strain..... 26
Roth v. United States..... 104
Rowe v. Tompson..... 43
Russell v. Men of Devon..... 77
Russell Mfg. Co. v. United States.... 57, 58, 60

S

Schollenberg, *Ex parte*.....63, 64
Schroeder v. City of New York..... 321
Schuster v. City of New York..... 75, 78, 83, 84, 85
Scott v. Gearner..... 19
Scott v. McNeal..... 240
Second Ave. Methodist Episcopal Church, Matter of..... 210
Shanks v. Dupont..... 161
Shapley v. Abbott.....41, 42
Sharp v. Speir..... 204

PAGE

Shaw v. Quincy Mining Co.....63, 64
Sloane v. Commissioner.....50, 55
Smyth v. Twin State Improvement Corp. 69, 72
Southern Pacific Co. v. Denton....63, 64
Sperry Prods. Inc. v. Aluminum Co. of America 263
Spielman v. Industrial Commissioner 117, 118
St. Clair v. Cox.....62, 64
Steele v. United States..... 23
Stern v. International Ry. Co..... 81
Stone v. Goodman..... 36
Stuart v. Palmer..... 222
Swift v. Tyson..... 113

T

Talbot v. Janson.....161, 162
Tauza v. Susquehanna Coal Co..... 65
Tifft v. City of Buffalo..... 220
Tisdale v. Connecticut Mutual Life Ins. Co. 235
Torras v. Stradley..... 278
Transparent-Wrap Mach. Corp. v. Stokes & Smith Co..... 258
Travelers Health Ass'n v. Virginia.... 68
Treadwell v. City of Yonkers..... 81
Trop v. Dulles.....151, 176

U

United States v. Aluminum Co. of America 260, 273
United States v. Associated Patents, Inc. 262
United States v. Besser Mfg. Co..... 261
United States v. Birdsboro Steel Foundry & Mach. Co..... 262
United States Casualty Co. v. Hercules Powder Co. 122
United States v. Cole..... 18
United States v. E. I. duPont de Nemours & Co..... 261

PAGE

United States v. General Elec. Co. 259, 260
United States Fid. & Guar. Co. v. United States 19
United States v. Hoper.....19, 21
United States v. Imperial Chem. Indus., Ltd. 261
United States v. Kintner....249, 251, 254
United States v. Nebraska Distilling Co. 18
United States v. O'Connor..... 13, 14, 15, 21, 23, 24
United States v. Philadelphia & R. R.R. 18
United States v. Pitt..... 279
United States v. Rindskopf....17, 20, 22
United States v. Smith..... 278
Urquhart v. City of Ogdensburg...79, 80
Utica Ins. Co. v. Bloodgood..... 40

V

Valdez v. Percy.....33, 34
Van Antwerp, Matter of..... 208

W

Walker v. City of Hutchinson....323, 324
Walker v. Sheldon.....288, 300
Watson v. City of Kingston..... 81
Weems v. United States..... 179
Weiss v. Fote.....75, 76, 82, 83, 84, 85
Western Express Co. v. United States 19
Whitehurst v. Kerr..... 63
William E. Freeman..... 52
Williams, Matter of..... 44
Williams v. Supervisors of Albany.... 222
Wolf v. Colorado.....83, 94
Wood v. Hughes..... 12
Woodson v. Huey.....31, 35
Worsley's Beverages, Inc. v. Bubble Up Corp. 73

Z

Zajicek v. Koolvent Metal Awning Corp. of America.....263, 275
Zoski v. Gaines..... 28